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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 458.

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, and C. O. CARNAHAN, General Chairman, Brotherhood of Railroad Trainmen,
Petitioners,

v.

SIMON L. HOWARD, SR., and ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

On Behalf of Respondent, St. Louis-San Francisco Railway Company.

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On Behalf of Respondent, St. Louis-San Francisco Railway Company.

OPINIONS BELOW.

The memorandum opinion of the District Court (R. 267) is reported at 72 F. Supp. 695. The opinion of the Court of Appeals (R. 339) is reported at 191 F. (2) 442.

JURISDICTION.

The jurisdiction of this court, under Title 28 U. S. C., Section 1254 (1), is conceded.

STATUTES INVOLVED.

Statutes involved are the Railway Labor Act, 48 Stat. 1185, 45 U. S. C., secs. 151 et seq. Pertinent provisions are printed in appendix hereto.

QUESTIONS INVOLVED.

1. Whether the matter in issue here is a jurisdictional dispute and is justiciable by the court.

2. Whether the decision of the District Court should be affirmed in toto.

STATEMENT.

In order to fully explain its contentions herein Carriers[1] feels it is necessary to enlarge upon the facts in the case set out in brief for petitioners.

For over 40 years train porters have been known as a separate class of employes (R. 284). They were unorganized and without representation as a group prior to 1921. Since that time they have been treated by the Carrier as a separate class of employes for representation purposes (R. 285-286).

It is known that seniority lists for brakemen have been in existence on the Carrier's lines for a long period of time, believed to be at least 60 years (R. 230). The present contract between Brotherhood and Carrier has been in effect, so far as brakemen are concerned, since March 15, 1920, to which amendments have been made (R. 231).

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1 Respondent, St. Louis-San Francisco Railway Company, will be hereinafter referred to as "Carrier." Respondent, Simon L. Howard, Sr., will be hereinafter referred to as "Train Porters."

Petitioner, Brotherhood of Railroad Trainmen, will be hereinafter referred to as "Brotherhood." Petitioner, C. O. Carnahan, etc., will be hereinafter referred to as "Petitioner Carnahan."

For this period of more than 40 years train porters, in accordance with custom or orders of their employer, performed some or all of the duties of head-end brakemen on passenger trains; and, in addition, they also were required to keep the coaches clean in transit and assist the passengers off and on trains (R. 284).

Brakemen, serving as head-end brakemen on passenger trains, are not required to clean the cars or assist passengers (R. 284).

Under date of December 21, 1945, Brotherhood circulated a strike ballot among its members employed in train and yard service of Carrier. This strike ballot covered twelve causes of complaint and were denominated as "cases." Among these was Case No. 3, described as a complaint by the Brotherhood "against train porters being used to perform the duties of brakemen on passenger trains" on the lines of Carrier (R. 192-194, 287).

Under date of January 3, 1946, Petitioner Carnahan advised the Carrier that a strike of yard and road service employes under the jurisdiction of Brotherhood would be effective at 6:00 p. m., Sunday, January 6, 1946 (R. 196-197, 287).

On January 5, 1946, the President of the United States issued an executive order creating an Emergency Board, pursuant to Section 10 of the Railway Labor Act. Such Emergency Board held public hearings commencing on January 11, 1946, and concluding on January 18, 1946 (R. 198).

Under date of January 24, 1946, the Emergency Board rendered its report and recommendations (R. 212-219). The Emergency Board took notice of the decision of this court in Order of Railway Conductors v. Pitney, decided January 18, 1946, 326 U. S. 561 (R. 216-217). It commented

on the similarity of the basic factual situation and issues in that case and those presented to it. It suggested that there was available to the parties an administrative tribunal created by Congress and that it was clearly the intent and purpose of the Railway Labor Act that disputes of such character be determined there. It advised, referring to Cases Nos. 3 and 10 of the remaining 11 cases on the strike ballot, that "all of these cases should be processed for submission to the Adjustment Board unless settled on the property" (R. 218). Brotherhood indicated they would not follow the recommendations of the Board and that the strike as originally set was not cancelled, but merely postponed (R. 128).

Thereafter, negotiations were resumed between Carrier and Brotherhood on February 5, 1946, and continued to February 8, inclusive, with further conferences being held on February 18 and 19, 1946 (R. 220).

On February 22, 1946, Petitioner Carnahan advised Carrier that "withdrawal time for members of my organization would be effective 6:00 p. m., February 26, 1946" (R. 220-221).

Negotiations were again resumed, and under date of March 7, 1946, all twelve cases on the strike ballot were settled.[2]

The settlement with respect to Case No. 3 read:

> "Effective April 1, 1946, the practice of train porters performing work generally recognized as brakemen's duties will be discontinued. Claims of certain brakemen who were available for the date of August 2,

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[2] "The evidence indicated that this contract was entered into by the Carriers reluctantly, and as a result of the strike threats" (R. 287, Finding of Fact No. 22; Cf. R. 131, 160, 279-280). One of the declared purposes of the Railway Labor Act is "To avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U. S. C., § 151a), and that Act makes it a duty to settle all disputes (45 U. S. C., § 152; Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239, 242).

1945, where claims have been submitted to be paid" (R. 222).

Under dates of March 9 and 12, 1946, Carrier advised officers of the union representing Train Porters of the agreement made with Brotherhood, and further that:

> "Under this agreement we will, effective April 1, 1946, discontinue all train porter positions. We will employ chair car porters on such trains as in our opinion their services are necessary or required" (R. 224-225).

Carrier had notices posted that bids would be entertained for brakemen to apply for head-end braking work for certain passenger trains or "runs". Those eligible for these positions were men holding seniority as brakemen (R. 43-44; 132). Train Porters received notices that they should turn in their switch keys, fusees and all their train equipment pursuant to the disposition of Case No. 3 (R. 45, 49, 50, 51; 133).[3]

This action was then filed on March 29, 1946, resulting in a restraining order prohibiting Carrier from putting into effect said agreement of March 7, 1946 (R. 9). Following the issuance of said restraining order, a general notice was published to all trainmen and yardmen advising them of the restraining order and that such order left the Carrier no choice but to withhold compliance with the agreement of March 7, 1946, between the Carrier and the Brotherhood (R. 51-53).

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3 Deprivation of train porters of the "head-end braking work" left remaining to be performed on passenger trains only duties incident to care of passengers and cars en route. Persons in the classification of "chair car porters" are employed on some trains solely to care for passengers and cars, but are not required to perform head-end braking duties. "Chair Car Porters" are represented by the same union as "Train Porters" and are covered by the same agreement; therefore Carrier advised officers of that union it would employ chair car porters on trains where it deemed necessary or required (R. 224).

SUMMARY OF ARGUMENT.

The real issue in this case is whether train porters or brakemen shall perform the necessary "head-end braking" work on Carrier's passenger trains. Obviously, it is illogical and impractical to have two persons doing the same work at the same time, such as operating the same switch at the same time. Train Porters are not here seeking merely retention in the employ of Carrier, but as well the retention of the right to continue to perform "head-end braking" on Carrier's passenger trains.

Such issue is a jurisdictional dispute, and, therefore, is not justiciable under controlling decisions.

Notwithstanding, the District Court holds that Carrier was required under the sections 2-Seventh and 6 of the Railway Labor Act (45 U. S. C., §§ 152-Seventh and 156) to give Train Porters 30 days notice before putting the agreement of March 7, 1946, with Brotherhood into effect. The 30-day notice requirement is not applicable to jurisdictional disputes. A determination of whether Carrier violated the Railway Labor Act in this respect is not justiciable under Pitney v. Order of Railway Conductors, 326 U. S. 561. Neither the Act nor the contract with the Train Porters' union required such notice, and, further, it appears the question was moot. Consequently, Carrier urges that the decision of the District Court should not be affirmed in toto.

ARGUMENT.

I.

This Is a Jurisdictional Dispute and Is Not Justiciable.

In the Statement it is clearly shown that the "Train Porters" and the "Brakemen" each were a separate craft or class for collective bargaining purposes, and each had its own collective bargaining agent and contract of employment with the Carrier covering rates of pay, rules and working conditions.

It is indisputable that each craft or class was separately established and recognized as such in 1934, when the present Railway Labor Act was enacted. Carrier was required to recognize each craft as then organized and to deal with the representative selected by each such craft and with none other. Order of Railway Conductors v. National Mediation Board, 113 F. (2) 531, 533; Brotherhood of Railroad Trainmen v. National Mediation Board, 88 F. (2) 757, 760; Brotherhood of Ry. & S. S. Clerks v. Nashville, C. & St. L. Ry. Co., 94 F. (2) 97, 99; Virginian Railway Co. v. System Federation, 300 U. S. 515.

The Train Porters, for over forty years, have been performing head-end brakemen's duties as well as cleaning cars and assisting passengers (R. 284). For a long period of time (not specifically fixed in the record) controversy existed between the Brotherhood and Carrier concerning the practice of Train Porters performing the head-end braking work (R. 286).

Through the subsequent turn of events, Carrier made the agreement with Brotherhood that the "practice of train porters performing brakemen's duties would be discon-

tinued." The Train Porters, through this action and some preliminary steps, claimed the right to continue doing such work. It appears indisputable to Carrier that the question here involved is a jurisdictional dispute.

It is, in the words of this court, in General Committee, etc., v. Missouri-Kansas-Texas Railroad Company et al., 320 U. S. 323, 334-335, "an asserted overlapping of the interests of two crafts" which "necessitates a determination of the point where the authority of one craft ends and the other begins, or of the zones where they have joint authority." As such it is not justiciable. Order of Railway Conductors v. Pitney, 326 U. S. 561; Slocum v. Delaware, L. & W., 339 U. S. 239.

II.

The Decision of the District Court Should Not Be Affirmed.

The District Court held that (1) it had no jurisdiction to determine the question whether train porters should be classified as brakemen and represented by the Brotherhood; (2) the National Mediation Board had exclusive jurisdiction to determine questions of classification under the Railway Labor Act; (3) this was a jurisdictional dispute and that Congress had conferred exclusive power on the National Railroad Adjustment Board in such disputes; and (4) it was the duty of the carriers under their agreement with the train porters and under sections 2-Seventh and 6 (45 U. S. C., section 152-Seventh and 156) to give train porters thirty days notice (R. 288-289).

The holdings that the matter of classification of train porters as brakemen was not justiciable, and that the National Mediation Board had exclusive jurisdiction, are sustainable. General Committee, B. of L. E., v. Missouri-

Kansas-Texas R. Co., 320 U. S. 323. However, as stated in Brotherhood of Railroad Trainmen v. National Mediation Board, 135 F. (2) 780,[4] 784 (concurring opinion), the National Mediation Board has no power

> "to decide a jurisdictional dispute merely as such. It can do so only as an incident to settling a dispute as to who shall represent a craft or class. No such dispute is presented. No one questions the right of any representative to represent the class or craft it now represents. No one contends there is a new or separate class for which a representative should be selected. The only dispute is whether certain men, not enough to affect the representation of either craft or class, shall be represented with the one or with the other; or, possibly, whether work now being done by members of one craft shall be taken from them and given to members of another, again without affecting the representation of either. Consequently, the Board rightly held that it had no power to determine the dispute, and the judgment affirming this should be sustained."

Carrier is in accord with the holding that the matter involved is a jurisdictional dispute. See point I of Argument.

With respect to holding No. 4, that the Carrier was required to give thirty days notice to the train porters under the Railway Labor Act and its contract with them, (1) the court was without jurisdiction to determine that question; (2) no requirement of the Act or the contract required such notice; and (3) any questions concerning the same were moot.

In Order of Railway Conductors v. Pitney, 326 U. S. 561, this court held in a matter of jurisdictional dispute that

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[4] Cited: General Committee v. M.-K.-T. R. Co., supra, l. c. 336, footnote 11; Switchmen's Union v. National Mediation Board, 320 U. S. 297, 301.

exclusive jurisdiction to determine such dispute was lodged in the National Railroad Adjustment Board. This decision was strengthened by the subsequent decision of this court in Slocum v. Delaware, L. & W. R. Co., 339 U. S. 239. In the Pitney Case, supra, after referring to Sections 2-Seventh and Section 6 of the Act, the court said, l. c. 565-567:

> "These sections make it clear that the only conduct which would violate § 6 is a change of those working conditions which are 'embodied' in agreements. * * * The court, therefore, had to interpret these contracts before it could find that § 6 had been violated. * * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. * * * Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. cannot show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand."

It is patent that the lower court clearly disregarded this decision of the Supreme Court in making this determination.

This being a jurisdictional dispute, Carrier was not required to give any notice under the Railway Labor Act, nor under its contract. Jurisdictional disputes arise out of the interpretation or application of agreements which are solely within the jurisdiction of the National Railroad Adjustment Board.

Section 2-Seventh of the Act provides that a carrier may not "change the rates of pay, rules or working conditions of its employes as a craft embodied in agreements" except in the manner prescribed in such agreements or in Sec-

tion 6 of the Act. Section 6 provides that carriers and representatives of employes shall give at least thirty days notice of an intended change in agreements affecting rates of pay, rules or working conditions, which notice shall fix the time for beginning of conferences between the representatives of the interested parties and which may ultimately involve the services of the Mediation Board.

Changes in rates of pay, rules or working conditions are within the jurisdiction of the Mediation Board [Section 155-First (a), idem.] and do not come within the jurisdiction of the National Railroad Adjustment Board.[5]

Furthermore, the contract with the Train Porters' union contains the following:

> "Rule 23. It is understood porters will be used only on such trains as the Company designates" (R. 191).

Carrier, therefore, under the plain wording of Rule 23 of the agreement, had the right at any time to use train porters on all, a part of, **or none** of its trains. Its action in advising train porters that their positions would be discontinued was no more than an election, under its contract, not to use train porters on any of its trains, effective April 1, 1946. Consequently, even under the contract, there was no change of a rule embodied in a contract involved, and, therefore, no obligation thereunder to give thirty days notice.

Furthermore, the questions pertinent to such notice were moot. After the notice was issued a restraining order was

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5 The National Railroad Adjustment Board's jurisdiction is limited to disputes "growing out of grievances or out of the interpretation or application of agreements" concerning rates of pay, rules or working conditions (Sec. 153, First (i), idem.). Southern Pac. Co. v. Joint Council Dining Car Employes, 165 F. (2) 26, cert. den. 333 U. S. 838. That Board does not have power to change, alter or amend an existing agreement. Shipley v. Pittsburgh & L. E. R. Co., 83 F. Supp. 722, 759; Templeton v. Atchison, T. & S. F. Ry. Co., 84 F. Supp. 162, 170, 181 F. (2) 527, cer. den. 340 U. S. 823.

issued in these proceedings by the District Court. Pursuant to that restraining order, the Carrier did not put into effect on April 1, 1946, the agreement of March 7, 1946; it posted notices advising its employes of the restraining order and its actions pursuant thereto. It withdrew bulletins of job vacancies addressed to brakemen and permitted the train porters to continue in their positions and perform all their duties thereunder. This situation is parallel to that in the case of Singer Manufacturing Company v. Wright, 141 U. S. 696, involving an attack on a license tax levied by the State of Georgia against vendors of sewing machines. While that case was pending the taxes were paid, and the court said, l. c. 700:

> "* * *, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which **we have neither the right nor the inclination to express an opinion. * * * The equitable ground for the relief prayed ceased with the payment of the taxes.**" (Emphasis supplied.)

Also in Standard Oil Co. v. United States, 283 U. S. 163 it was held that in the suit for injunction under the Sherman Act questions raised by the Government as to the validity of agreements between defendants became moot when the agreements were cancelled by the defendants at the request of the District Court before the entry of the decree, the court saying, l. c. 182:

> "**As the relief here sought is an injunction, and hence related only to the future, United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft** 239 U. S. 466, 475, **the alleged validity of such provisions has become moot.**" (Emphasis supplied.)

CONCLUSION.

The controversy in issue is a jurisdictional dispute, which is not justiciable. The District Court's decision should be reversed insofar as it held that Carrier was required under the agreement with train porters and under the Railway Labor Act to give thirty days notice.

Respectfully submitted,

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APPENDIX.

Railway Labor Act, Section 1 (a); 45 U. S. C., Sec. 151 (a):

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, Sec. 2; as added June 21, 1934, c. 691, Sec. 2, 46 Stat. 1186."

Railway Labor Act, Section 2; 45 U. S. C., Sec. 152:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions

of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

Railway Labor Act, section 3, First; 45 U. S. C., Sec. 153, First:

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First Division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second Division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth Division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Railway Labor Act, Section 5, First, 45 U. S. C., Sec. 155, First:

"First. Disputes within jurisdiction of Mediation Board.

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this chapter) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this chapter, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Railway Labor Act, Section 6; 45 U. S. C., Sec. 156:

"§ 156. Procedure in changing rates of pay, rules, and working conditions.

"Carriers and representatives of the employees shall give at least thirty days' written notice of an

intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this chapter, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. (May 20, 1926, c. 347, § 6, 44 Stat. 582, as amended June 21, 1934, c. 691, § 6, 48 Stat. 1197.)"